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IN THE

Supreme Court of the United States

October Term, 1953

No. 610

JOHN LEIDMAN,

Petitioner,

vs.

SIDNEY H. BINGHAM, Chairman, G. JOSEPH MINETTI and JAMES F. DULLIGAN, members of and constituting the Board of Transportation of the City of New York and LAZARUS JOSEPH, Comptroller of the City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. .....

JOHN LEIDMAN,

Petitioner,

vs.

SIDNEY H. BINGHAM, Chairman, G. JOSEPH MINETTI and JAMES F. DULLIGAN, members of and constituting the Board of Transportation of the City of New York and LAZARUS JOSEPH, Comptroller of the City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner herein prays for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of New York.

Jurisdiction.

The decision of the Court of Appeals of the State of New York, reversing an order of the Appellate Division of the Supreme Court, First Department of the State of New York, was rendered December 3, 1953, with an opinion indicating that said Court of last resort of the State of

New York passed upon a question of interpretation of a Federal Statute, namely the Federal Soldiers and Sailors Civil Relief Act (U. S. C. A. title 50, Appendix Section 522). The opinion of the Court of Appeals reported, 306 N. Y. 663, 116 N. E. 2d 496, is appended hereto.

The judgment of the Court of Appeals finally determined plaintiff's suit herein dismissing the complaint upon the merits and the Court of Appeals forwarded its remittitur to the Supreme Court of the State of New York, County of New York, wherein the action originated, to be enforced according to law, and the latter Court entered an order on January 7, 1954, making the order of judgment of the Court of Appeals the order of said Court of original jurisdiction. Copies of the remittitur of the Court of Appeals and the order of the Supreme Court of New York County are appended hereto.

Jurisdiction of this Court is invoked under Title 28, Section 1257(3) of the U. S. Code.

Opinions Below.

The opinion of the Appellate Division of the Supreme Court rendered upon the first appeal from the lower Court, reversing an order dismissing the petition and directing the trial of an issue of fact, to determine whether the petitioner was guilty of laches, is hereto appended (R. pp. 50-56; 277 App. Div. 34).

The opinion of the Trial Term, Supreme Court, rendered after the trial of the issue of fact is hereto appended (R. p. 161, not officially reported).

The opinion of the Appellate Division of the Supreme Court, which unanimously affirmed the order of Trial Term, granting petitioner the relief prayed for, is hereto appended (R. pp. 168-169; 281 App. Div. 822).

The opinion of the Court of Appeals reversing the latter order by the Appellate Division and dismissing the petition, which is sought to be reviewed by this Court, 306 N. Y. 663, 116 N. E. 2d 496, is appended hereto.

Statutes Involved.

50 U. S. C. A. Appendix Section 522 provides:

> "Sec. 522. *Fines and Penalties on Contracts, etc.*
>
> When an action for compliance with the terms of any Contract is stayed pursuant to this Act no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation and a fine or penalty for such nonperformance is incurred a court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired."

Military Law Sec. 245, of the State of New York, provides:

> "Sec. 245. *State and Municipal Officers and employees absent on military or naval duty.*
>
> 1. Every officer and employee of a municipal corporation * * * shall be entitled to absent himself from his duties or service while engaged in the performance of ordered military or naval duty * * * if the period of absence in any calendar year exceeds thirty days he shall receive for the period of absence

in excess of thirty days such part of his salary or compensation of such officer or employee as equals the excess, if any, of such salary or compensation paid to him for the performance of such duty." (As amended L. 1942, ch. 255 reenacted in changed form, Military Law Sec. 242, Subd. 1(2), 5 (Laws of 1953, Ch. 420).)

Administrative Code, City of New York, Sec. 93c-2.0, provides:

> "Sec. 93c-2.0. *Payment of Salaries*—Every official, employee or person who shall sign the receipt upon such payroll as having received the amount therein mentioned in full payment for services rendered by him for the entire time specified in such payroll shall be deemed to have made an accord and satisfaction of all claims against the City for the period covered by such payroll, unless at the time of such signing such payroll the person receiving such wages or salary shall write legibly thereon in connection with his receipt that the amount is received under protest, and unless such protest is so written no recovery shall be had against the city upon any further claim for wages or salary for the period of time covered by such payroll. * * * "

Statement.

Petitioner, a civil service employee of the State of New York, was attached to the Board of Transportation of the City of New York as a stenographer at an annual salary of $1440. On February 13, 1942 he was called into active military service from the U. S. Coast Guard Reserve and he continued in such military service until March 2, 1946 when he was honorably discharged (fols. 51-53).

By virtue of the provisions of the Military Law of the State of New York (Sec. 245) he was entitled to receive the difference in pay between his salary in the U. S. Coast Guard and such as he was entitled to receive, with increments, as a stenographer Grade 2 in the employ of the Board of Transportation.

The Board of Transportation adopted a resolution providing for an annual increment of $120., to all stenographers of petitioners grade, and the finding of the Appellate Division is, that as a matter of law the petitioner was entitled to such increments even though a reservation was claimed to have been adopted by such Board, which had the effect of augmenting petitioners salary only for the purpose of maintaining his salary status upon discharge from military duty and resumption of service with the Board of Transportation (fols. 155-156). The petitioner did not receive his annual increments which amounted to a total of $732.90 (fol. 57).

Respondents in their answer invoked Sec. 93c-2.0 of the Administrative Code of the City of New York as constituting a bar to petitioners right to recover, by reason of petitioner failure to note upon the official payroll sheets the words "under protest", and by reason of the fact, that those endorsing petitioner's checks while he was in the military service did not add the notation "under protest", thereby creating an accord and satisfaction of petitioners claims to such unpaid salary (fols. 99-108).

The Appellate Division held, that petitioner was relieved from the failure to protest by the reason of his military service (fols. 158, 506-7).

The Court of Appeals reversed the holding of the Appellate Division and found that the failure to protest constituted a complete bar to the maintenance of the action and that the Federal Soldiers and Sailors Relief Act did

not relieve petitioner from protesting in the form and manner provided for by the Administrative Code of the City of New York, even though petitioner was prevented from so doing by reason of military service.

Question Presented.

Does Sec. 93c-2.0 of the Administrative Code of the City of New York, providing for loss and relinquishment of all claims by employees of the City of New York, unless payments received are protested, conflict with the provisions of the Federal Soldiers and Sailors Relief Act (U. S. C. A. 50 Sec. 522), where the failure to protest is occasioned by reason of impairment due to military service?

Reason for Granting Writ.

(1)

There can be no dispute with the proposition of law, that a state statute must yield to Federal Law with which it comes in conflict.

U. S. v. *Emory,* 62 S. Ct. 317, 314 U. S. 423;
Tresta v. *Katt,* 330 U. S. 386;
U. S. v. *Allegheny Co.,* 322 U. S. 174;
Yalobusha v. *Crawford,* 165 F. 2d 867.

Undoubtedly, the Federal Law was designed to afford relief to those engaged in military service and should be liberally construed to accomplish its purpose.

Le Maistre v. *Leffers,* 68 S. Ct. 371, 333 U. S. 1, 992 Ed. 429;
Boone v. *Lightner,* 63 S. Ct. 1223, 319 U. S. 561.

The record in the case at bar indicates that judgment was rendered in favor of respondents as a matter of law

upon the undisputed fact that petitioner failed to sign "under protest" (Court of Appeals, opinion appended).

The Administrative Code provisions requiring protest have been held here to be so rigid that no relief from its forfeiture provisions may be permitted, even if failure to comply was due to impairment caused through military service. The federal statute clearly provides that failure to comply with provisions such as are contained in the Administrative Code of the City of New York, caused through military service, shall constitute grounds for relief from forfeiture or penalty.

The appeal to the Court of Appeals having been brought by permission of the Appellate Division upon certified questions, the judgment of the Court of Appeals carries with it the presumption that all questions of fact were determined in favor of petitioner here (Sec. 603 of the Civil Practice Act, State of New York).

It follows that upon the question of fact as to whether failure to protest was due to inability created by military service, the petitioner prevailed in all Courts.

(2)

The Court of Appeals misapprehended the meaning, effect and the denial of certiorari by this Court in *Pisciotta* v. *The City of New York*. There the Appellate Division determined the issue of fact against petitioner. The issue there turned upon the question as to whether Pisciotta was compelled by duress to sign an agreement before he entered the military service that he would not protest his stipulated difference in salary.

It seems reasonable to assume that this Court denied certiorari for that reason and that certiorari was not warranted, in that, the Federal question there presented, was not substantial nor did the case turn solely upon the con-

flict between the Federal Statute and the Administrative Code.

The Court of Appeals reliance upon the denial of certiorari in the *Pisciotta* case as the final pronouncement by this Court, that the Federal Soldiers and Sailors Relief Act, is not in conflict with the Administrative Code of the City of New York, is not supported by pronouncements of this Court in other cases.

In *Boone* v. *Lightner, supra,* this Court dealt with the question, as to whether a stay of Court proceedings on behalf of a defendant, in military service, was justified by the provisions of the Soldiers and Sailors Relief Act. The pertinent section of the law applicable there, grants the Court to whom the application for the stay is made an exercise of discretion, in acting upon the application.

Mr. Justice Jackson, at page 575, said:

> "The Soldiers and Sailors Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discression that is vested in trial Courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being judged is usually *prima facie* prejudicial. But in some few cases absence may be a policy instead of the result of military service, and discretion is vested in the Courts to see that immunities of the Act are not put to such unworthy use."

Such was the finding of fact in the *Pisciotta* case. Namely that petitioner was guilty of bad faith in urging the immunities of the Soldiers and Sailors Civil Relief Act.

This case presents the complete reverse situation, for the findings of fact, by all the Courts of the State of New York, is that petitioner was before the Courts in good faith and was disabled from complying with the City Code, by reason of his military service.

(3)

It appears therefore, that confusion exists as to the meaning, interpretation and application of the Federal Soldiers and Sailors Civil Relief Act.

It is important that this unsettled principle of law be resolved, for it affects wide public interest, both, to the many Civil Service employees of the City of New York engaged in the military service and numerous States and Municipalities.

CONCLUSION.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

February 26, 1954.

Respectfully submitted,

IRVING LEMOV,
Attorney for Petitioner.

APPENDIX.

Opinion of Court of Appeals.

COURT OF APPEALS OF THE STATE OF NEW YORK

December 3, 1953

No. 266

In the Matter

of

the Application of JOHN LEIDMAN,

Respondent,

on behalf of himself and other employees similarly situated for an Order &c.,

vs.

SIDNEY H. BINGHAM, Chairman, & ors., members of and constituting the Board of Transportation of the City of New York, & ano., &c.,

Appellants.

PER CURIAM:

It is undisputed that petitioner failed to sign "under protest" the payrolls as well as the checks issued thereon for the period in question. Accordingly, section 93c-2.0 of the Administrative Code of the City of New York prevents his recovery on any further claim for wages and salary during the period of his active military duty.

Neither the State Soldiers' and Sailors' Civil Relief Act (N. Y. Military Laws, c. 36, §305) nor its Federal counterpart (U. S. C. A., Tit. 50, Appendix §522) relieved petitioner of the necessity of signing under protest as prescribed by section 93c-2.0 of the Administrative Code. (*Pisciotta* v. *City of New York*, 275 App. Div. 966, 90 N. Y. Sup. (2) 706, affd. 300 N. Y. 664, 91 N. E. 2d 323, reargument denied and remittitur amended 300 N. Y. 755, 92 N. E. 2d 460, cert. den. 340 U. S. 825), 71 S. Ct. 60, 95 L. Ed. 606.)

The orders appealed from should be reversed and the petition dismissed, without costs.

Lewis, Ch.J., Conway, Desmond, Dye, Fuld and Froessel, JJ. concur; Van Voorhis, J. taking no part.

Orders reversed, etc.

Remittitur of the Court of Appeals.

No. 266

In the Matter

of

the Application of JOHN LEIDMAN,

Respondent,

on behalf of himself and other employees similarly situated for an Order &c.,

vs.

SIDNEY H. BINGHAM, Chairman, & ors., members of and constituting the Board of Transportation of the City of New York, & ano., &c.,

Appellants.

BE IT REMEMBERED, That on the 25th day of September in the year of our Lord one thousand nine hundred and fifty-three, Sidney H. Bingham, Chairman, & ors., members of and constituting the Board of Transportation of the City of New York, & ano., &c., the appellants in this cause, came here unto the Court of Appeals, by Denis M. Hurley, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And John Leidman, on behalf of himself and other employees similarly situated, the respondent—in said cause, afterwards appeared in said Court of Appeals by Charles Belous, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Henry J. Shields, of counsel for the appellants, and by Mr. Charles Belous, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the orders and the same hereby are reversed, and the petition dismissed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said orders be reversed, and the petition dismissed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(sgd) RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York

Court of Appeals, Clerk's Office
Albany, December 3, 1953.—ss.:

SEAL

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(sgd) RAYMOND J. CANNON
Clerk.

COURT OF APPEALS

State of New York—ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of December in the year of our Lord one thousand nine hundred and fifty-three, before the Judges of said Court.

WITNESS,

The HON. EDMUND H. LEWIS,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur December 3, 1953

Order of the Supreme Court Entered on Remittitur of the Court of Appeals.

At a Special Term, Part II, of the Supreme Court, held in and for the County of New York, at the County Court House in said County, on the 7th day of January, 1954.

Present:—Hon. Thomas L. J. Corcoran,
Justice.

In the Matter

of

the Application of John Leidman,
Petitioner-Respondent,

on behalf of himself and other employees similarly situated, for an order under Article 78 of the Civil Practice Act,

AGAINST

Sidney H. Bingham, Chairman, G. Joseph Minetti, and James F. Dulligan, members of and constituting the Board of Transportation of the City of New York, and Lazarus Joseph, Comptroller of the City of New York,

Respondents-Appellants.

The respondents-appellants having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, entered herein in the office of the Clerk of said Appellate Division on or about the 13th day of March, 1953, which order affirmed (1) the order entered in the office of the Clerk of the County of New York on the 24th day of March, 1952,

directing respondents to pay to petitioner annual increments not included in computing differential in military pay and civilian pay, pursuant to the provisions of Section 245 of the Military Law of New York, (2) the order entered in the office of the Clerk of the County of New York on the 24th day of March, 1952, granting motion of petitioner for a final order, (3) the order entered in the office of the Clerk of the County of New York on the 24th day of March, 1952, denying respondents' motion for an order referring to Trial Term, Part III, for re-settlement the order of the Court, dated January 10, 1952, and the respondents-appellants having brought up for review on said appeal the order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of said Appellate Division on or about the 9th day of June, 1950, which order modified the order entered in the office of the Clerk of the County of New York on the 27th day of October, 1949, denying the petitioner's application, and the appeal having been duly argued at the Court of Appeals, and that Court, in an order dated the 3rd day of December, 1953, having ordered and adjudged that the orders so appealed from be reversed and the petition dismissed, without costs,

Now, upon reading and filing the remittitur from the Court of Appeals, and on motion of Adrian P. Burke, Corporation Counsel, attorney for respondents, it is

ORDERED, that the order and judgment of the Court of Appeals be and the same hereby is made the order of this Court.

Enter,

T. L. J. C.,
J. S. C.

Opinion of the Appellate Division, dated May 23, 1950.

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

April 1950.

DAVID W. PECK, *P. J.*,
EDWARD J. GLENNON,
EDWARD S. DORE,
ALBERT COHN,
JOHN VAN VOORHIS, *JJ.*

[SAME TITLE]

Appeal by petitioner from an order denying his application for an order under Article 78 of the Civil Practice Act, directing respondents to prepare a supplemental payroll providing for payment to petitioner, and to other employees similarly situated, the difference in salary due under Section 245 of the Military Law.

Charles Belous, of counsel (Irving Lemov with him on the brief; Charles Belous, attorney) for Appellant.

Henry J. Shields, of counsel (Seymour B. Quel with him on the brief; John P. McGrath, Corporation Counsel, attorney) for Respondents.

VAN VOORHIS, *J.*:

The question in this case is whether petitioner-appellant, a stenographer and typist employed by the Board of Transportation of the City of New York, is entitled to recover an annual increment at the rate of $120 for a period between the years 1942 to 1945. He was then in the Military service of the United States. He claims under Section 245 of the Military Law, which provides that

"Every officer and employee of the state or of a municipal corporation or of any other political subdivision" shall be entitled to recover the excess of his compensation as such over and above that paid to him for the performance of his military duty in time of war.

While petitioner is one for whose benefit Section 245 of the Military Law was adopted, as respondents have recognized by paying him some excess compensation while he was in the service, he was paid no increments, and respondents contend that he is not covered by the McCarthy mandatory increment law (Section B40-6.0 of the Administrative Code) which refers to City employees. Employees of the Board of Transportation are city employees for some purposes but not for others. The cases of Matter of Colbert v. Delany, 249 App. Div. 209, aff'd 273 N. Y. 626, and Wilmerding v. O'Dwyer, 272 App. Div. 35, reversed on ground that the issues had become moot, 297 N. Y. 664, indicate that the Board of Transportation acts independently of the Board of Estimate in determining the salaries and wages of its employees.

We are not called up to decide whether petitioner is covered by the McCarthy mandatory increment law, however, for the reason that the Board of Transportation itself adopted a general resolution providing for annual increments which paralleled the McCarthy mandatory increment law. This resolution provided for annual increments of $120 in the case of stenographers and typists in petitioner's grade, subject to action in specific cases, but the Board took specific action in petitioner's case, in each of the years in question, directing such an increment. It is true that in petitioner's case these separate resolutions, covering the years in question, contained the statement: "Effective when employee returns from military duty to active civil duty." It is argued that this meant that he was never to be paid such sums, but that for these years his salary should theoretically be augmented by $120 per

annum, in order to put him on an ostensible parity with employees of the Board of Transportation who had not gone to war, but only for the purpose of determining his future rate of compensation, at such time as he might return to civil duty as an active employee of the Board. We think that this qualifying clause could have had no such limited effect. If he had remained at home working for the Board, he would have been entitled to these increments; the purpose of section 245 of the Military Law was to allow them to him, in like manner, while at war.

Section 16-b of the Civil Service Law provides that honorable service in the Army and Navy is to be rated as merit. Appellant, therefore, had the equivalent of meritorious service as an employee of the Board of Transportation while undergoing military service, and was entitled to such increments as the Board allowed. The Board could not have allowed merely theoretical increments; these allowances had to be actual for all purposes or not at all.

The Board of Education cases (Timmerman v. Board of Education, 274 App. Div. 934, aff'd 298 N. Y. 908, and Silverstein v. Board of Education, 190 Misc. 588, aff'd 190 Misc. 990, aff'd 273 App. Div. 990, leave to appeal denied 274 App. Div. 763), do not appear to be analogous, inasmuch as the increments were mandatory in those cases under the Education Law. The result is the same, however, where the Board of Transportation, in its discretion, has granted such increases in compensation.

The circumstances that, while in military service in time of war, appellant signed without protest the checks which he received from the City, representing the excess of his salary (without increments) over and above his military pay, should not preclude him from recovery here, in view of Section 305 of the Soldiers and Sailors Civil Relief Act.

The proceeding is remanded for trial, however, instead of granting relief upon the pleadings, in view of delay in its commencement. Petitioner was discharged from mili-

tary service on March 2, 1946, and returned to civil duty as an employee under the Board of Transportation on April 16, 1946. This proceeding was not commenced under Article 78 of the Civil Practice Act until August 15, 1949. It could not be maintained within the four months' time limitation imposed by Section 1286, unless begun within four months after respondents' refusal to comply with petitioner's demand for payment of his accrued salary increments. Respondents' alleged refusal was, it is true, by letters dated April 19, 1949 and July 15, 1949, which were written within the four months' period. Nevertheless, a claimant cannot wait indefinitely before making such a demand, and it is not clear from the record when the demands were made by petitioner which resulted in these communications from respondents. The first letter from him to respondents, which is set forth in the record, is dated December 22, 1947, which was more than a year and eight months after petitioner had returned to the Board of Transportation. There is some indication in the record that filing of a formal demand, and consideration of this matter by the Board, when petitioner first returned from military service, may have been held in abeyance pending the outcome of litigation involving the Board of Education, or other departments in the City. Upon the trial to be had pursuant to this decision, evidence may be taken with respect to whether petitioner has been guilty of such laches in making his demand as should bar relief.

This proceeding has not been regarded as representative in character, but as having been instituted in petitioner's interest as an individual employee.

The order appealed from should be modified, with costs to petitioner to abide the event, so as to provide for a trial of the proceeding.

Peck, P.J. and Glennon, J. concur.

Dissenting Opinion of Dore, J.

———o———

[SAME TITLE]

———o———

DORE, *J.* (dissenting in part):

I dissent in part and vote to remand for trial, in addition to the issue of laches, all issues relating to the facts under which appellant failed to sign under protest. Otherwise, I concur in the opinion of Justice Van Voorhis.

Cohn, J. concurs.

Decisions of Breitel, J., on Motions for a Final Order and for Referral, Etc.

Vol. 127, New York Law Journal, Page 1183, March 25, 1952

By Mr. Justice Breitel.

Leidman v. Bingham—Motion for a final order is granted. Order signed. The decision in the Appellate Division and the opinion rendered therewith (277 App. Div., 34) is the law of the case. The city is in effect asking this court to overrule the Appellate Division on the authority of Pisciotta v. City of New York (300 N. Y., 664, rearg. den. 300 N. Y., 755) in which it was held that the Federal Soldiers and Sailors Civil Relief Act (U. S. Code, tit. 50, appendix, sec. 510, et seq.) did not supersede or suspend the provisions of the Administrative Code of the City of New York (sec. 93C-2.0) and presumably therefore that section 305 of the New York State Military Law likewise did not supersede or suspend the Administrative Code provision. In any event it is not too clear that the Administrative Code provision applies to an employee of the board of transportation (see Matter of Colbert v. Delaney, 249 App. Div., 209, aff'd 273 N. Y., 626, and the opinion herein in the Appellate Division, cit., supra).

Leidman v. Reid—Motion for referral of the motion to Trial Term, Part III, and for a final order in the form annexed is denied (see memorandum on motion herein decided simultaneously herewith).

Opinion of Appellate Division, Reported in 281 App. Div. 822.

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

January, 1953

DAVID W. PECK, *P. J.*
EDWARD S. DORE,
ALBERT COHN,
JOHN VAN VOORHIS, *JJ.*

PER CURIAM:

The Trial Term's determination of the issue of laches remanded to it as an issue of fact by the order of this Court on the prior appeal herein (277 App. Div. 34, appeal dismissed 302 N. Y. 675) is supported by the evidence and should not be disturbed.

The dissents on that prior appeal were only in part; namely, to remand for trial, in addition to the issue of laches, issues relating to the facts under which the employee failed to sign under protest. Accordingly, on that appeal, this Court unanimously held that petitioner herein is one for whose benefit Section 245 of the Military Law was adopted; that the Board of Transportation, by general resolution providing for annual increments paralleling the McCarthy mandatory increment law and by specific action in this petitioner's case, directed in each of the years in question payments to petitioner of annual increments of $120; that such allowances had to be actual for all purposes and not merely theoretical; that the purpose of Section 245 was to allow an increment to petitioner

while he was at war the same as he would have received under like circumstances if he had remained at home working for the Board. The Court also held that the circumstance that, while in military service in time of war petitioner signed without protest, should not preclude him from recovery.

That decision is the law of the case and it has not been altered or modified by the Court of Appeals. On appeal to the Court of Appeals on a certified question, the Court of Appeals dismissed but solely on the ground that the question certified was not decisive of the correctness of the order of this Court.

Appellants rely on *Pisciotta* v. *City of New York* (300 N. Y. 664, affg. 275 App. Div. 966, remittitur amended 300 N. Y. 755, certiorari denied 340 U. S. 825). But on its facts that case is distinguishable. The plaintiff therein had signed a written release and waiver agreeing to accept a lower salary, viz., his salary as Deputy Markets Commissioner as the basis for computing his military pay differential under Section 245 of the Military Law; but on his return from war service he sought to relieve himself of that written agreement by claiming duress. In that case the legal effect of the written waiver was sufficient to preclude recovery. Accordingly on the particular state of facts presented to us in this record and in view of this Court's prior ruling herein and the finding of the trial Court that petitioner was not guilty of laches, the order of the learned trial Court should be affirmed.

The order on the original motion appealed from and the order granting petitioner's motion for a final order appealed from, both dated March 24th, 1952, should be affirmed, with costs to petitioner-respondent. Settle order.

The order denying respondents' motion for referral appealed from should be affirmed.

Peck, *P. J.*, Dore, Cohn and Van Voorhis, *JJ.*, concur.

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 610

JOHN LEIDMAN,

Petitioner,

vs.

SIDNEY H. BINGHAM, Chairman, G. JOSEPH MINETTI and JAMES F. DULLIGAN, members of and constituting the Board of Transportation of the City of New York and LAZARUS JOSEPH, Comptroller of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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The Question Involved

The question involved in this proceeding is whether the denial of payment of a higher rate of salary to a municipal employee because of his failure to receipt for semi-monthly payments "under protest" in compliance with the requirement to do so under the provisions of § 93c-2.0 of the Administrative Code of the City of New York constituted a "fine or penalty" within the intention of 50 U. S. C. A., Appendix § 522 (Soldiers and Sailors Civil Relief Act).

Statutes Involved

The statutory provision under which petitioner claims a benefit is 50 U. S. C. A., Appendix § 522, reading as follows:

"Sec. 522. **Fines and penalties on contracts, etc.** When an action for compliance with the terms of any contract is stayed pursuant to this act [sections 501-548 and 560-590 of this appendix] no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation, and a fine or penalty for such nonperformance is incurred a Court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired."

The provision of the Administrative Code of the City of New York which requires an employee to protest upon the payroll receipt against a payment less than the amount he claims to be due is

"§ 93c-2.0. **Payment of Salaries.** Every official, employee or person who shall sign the receipt upon such payroll as having received the amount therein mentioned in full payment for services rendered by him for the entire time specified in such payroll, shall be deemed to have made an accord and satisfaction of all claims against the City for wages or salary due to such person from the City for the period covered by such payroll, unless at the time of signing such payroll the person receiving such wages or salary shall write legibly thereon in connection with his receipt that the amount is received under protest, and unless such protest is so written, no recovery shall be had against the City, upon any further claim for wages or salary for the period of time covered by such payroll. * * *"

Argument

(1)

The reason urged by this petitioner for the granting of certiorari is the same reason that was urged in *Pisciotta* v. *City of New York,* 340 U. S. 825 (1950), where this Court denied the application for a writ of certiorari. Each case decided the claim of a municipal employee who had failed to receipt on the payroll "under protest" during his absence from duty on ordered military service. The sole argument made by petitioner is that the facts in this case and those in the *Pisciotta* case are distinguishable.

Petitioner's attempt to distinguish this case from the *Pisciotta* case is not factually correct. He states (Petition, p. 7) that

> "The issue there turned upon the question as to whether Pisciotta was compelled by duress to sign an agreement before he entered the military service that he would not protest his stipulated difference in pay."

But that statement is true only of the disposition of the *Pisciotta* case upon the trial. The Trial Court found that such duress did exist but the Appellate Division reversed that determination and dismissed the complaint "on the law". After referring to the issue of duress the Court stated its decision as follows (275 App. Div. 966):

> "Judgment in favor of plaintiff reversed on the law and the facts, with costs, and *the complaint dismissed on the law,* with costs. The receipt, without protest, of the salary paid is a complete bar to the action. (Administrative Code of the City of New York, § 93c-2.0; *Quayle* v. *City of New York,* 278 N. Y. 19; *Gendel* v. *City of New York,* 297 N. Y. 933.)" (Italics supplied.)

The Appellate Division then, having in mind its obligation under the New York Civil Practice Act, § 602 to clarify

its action in the disposition of the question of fact with respect to plaintiff's claim of duress, explained that it had examined the facts in the record on that point and was of the opinion that the finding of the Trial Court was against the weight of the evidence and that *if that question were necessary to a decision of the case* the Court would order a new trial of the question. This portion of the decision is as follows:

> "In any event a new trial would be granted because, in our opinion the finding of coercion, particularly with respect to the failure to sign the payroll receipts under protest, is against the weight of the evidence."

The Court of Appeals affirmed, without opinion, and upon that record this petitioner cannot properly claim that the decision in the *Pisciotta* case "turned upon the question [of duress]." The affirmance by the Court of Appeals of the dismissal of the complaint by the Appellate Division was necessarily a ruling based upon the law and constituted an approval of the disposition of the dismissal of the complaint on the law by the Appellate Division. For if the Court of Appeals had deemed the factual question of duress to be material to the decision of the case, it would have had to order a new trial instead of dismissing the complaint. This is necessarily so because under well established New York practice, the Court of Appeals has no power to pass upon the facts where the Appellate Division has reversed a finding of fact of the Trial Court but has made no new findings of fact and has indicated that, if such factual finding were material to the issues involved, a new trial would be ordered. New York Civil Practice Act, § 605; *Buono* v. *Stewart Motor Trucks, Inc.*, 292 N. Y. 637 (1944); *New York Life Ins. Co.* v. *Veit*, 294 N. Y. 222 (1945); *Schneider* v. *Brooklyn Bus Co.*, 294 N. Y. 707 (1945); *McCrink* v. *City of New York*, 296 N. Y. 99 (1947); *Cohen* v. *City of New York*, 296 N. Y. 814 (1947); *Lynes* v. *Debenedictus*, 303 N. Y. 772 (1952).

(2)

The two decisions cited by petitioner as authority for holding that § 522 of the Soldiers and Sailors Relief Act should be construed to apply to petitioner's failure to protest on the payroll receipts have no application to the facts in this case.

In *Boone* v. *Lightner*, 319 U. S. 561 (1948) the provision of the Relief Act permitted the granting of a stay to either party to an action unless, in the opinion of the Court, the ability of the party to conduct the litigation "is not materially affected by reason of his military duty." This Court held that the party's ability to defend his case was not materially affected and that the denial of a stay was not an abuse of discretion.

In *LeMaistre* v. *Leffers*, 333 U. S. 1 (1948), the decision was that a statute limiting the time within which real estate sold for non-payment of taxes may be redeemed does not run against the defaulting owner during the time he is absent on military duty.

While the war relief statutes should be liberally construed to effect the special benefits therein enumerated, their application cannot be extended to include other benefits. *People ex rel. Davison* v. *Williams*, 213 N. Y. 130, 133 (1914); *Matter of Barthelmess* v. *Cukor*, 231 N. Y. 435, 441 (1921); *Matter of Neubeck* v. *Bard*, 275 N. Y. 43, 48 (1937); *Rosenstock* v. *City of New York*, 97 App. Div. 337, 341 (2nd Dept., 1904), aff'd 181 N. Y. 550 (1905). In the *Davision* case, a veteran volunteer fireman in the service of the City of New York claimed an absolute right of retention upon the reduction of the force because of lack of work. Judge Cardozo, writing for the Court of Appeals, said (213 N. Y. at p. 133):

> "To make out the right to such preference, an employee must be able to put his finger upon the precise provision of the statute which secures it to him. This the relator cannot do."

The right claimed by the petitioner is something more than the statute gives. By no stretch of the imagination can it be said that petitioner's "ability * * * to * * * perform [the obligation to receipt under protest] was materially impaired" by his absence on military duty. Petitioner signed semi-monthly receipts over a four year period and he cannot deny knowledge of the statutory requirement to receipt "under protest" (Record on Appeal, fols. 99-107). The necessity for making such protest precludes the possibility that the provision of the war relief statute was intended to excuse the performance of the requirement. The salaries of public employees are paid from funds which are received upon a year to year basis, usually from tax revenues. The orderly conduct of the public business requires that the obligations which are to be paid from such income should be known within the taxing period. If the assertion of claims (as in this case more than four years after the taxing period had passed) were to be permitted, there would be complete confusion in the public finances. This is especially true where the Relief Act, if given the construction sought by petitioner, would apply to a considerable number of claimants. It is inconceivable that the provision here involved had any such purpose.

CONCLUSION

The application for a writ of certiorari should be denied.

March 29, 1954.

Respectfully submitted,

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